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No. 86-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF OF AMICUS CURIAE BEACON OIL COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where funds, obtained by an administrative agency from private parties in enforcement proceedings, are retained in an interest-bearing escrow account for the benefit of parties found to have been injured by regulatory violations, and where the government has never claimed a right to those funds, whether the court of appeals erred in ruling that parties found by the administrative agency to be entitled to the funds are barred by sovereign immunity from recovering their *pro rata* share of the accrued interest on those funds.

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BRIEF OF AMICUS CURIAE BEACON OIL COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

Beacon Oil Company (Beacon) respectfully submits this brief in support of Petitioners. Like Petitioners, at all relevant times, Beacon was a small and independent refiner as those terms are defined in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. (1982). The company's only refinery is located in Hanford, California. Beacon markets its refined products principally in California.

Also like Petitioners, Beacon secured final administrative orders determining that Beacon was entitled to a

refund of monies which the Department of Energy erroneously required Beacon to pay into the agency's Crude Oil Entitlements Program. As fully described by Petitioner (Pet. at 3), the Entitlements Program required refiners to make cash payments to other refiners to equalize the economic benefits of access to price-controlled crude oil. No funds were paid to the government and no funds were paid by the government.

In 1981, the Department of Energy's Office of Hearings and Appeals found that Beacon was suffering severe financial hardship as a result of overpayments the Department erroneously required Beacon to make to the Entitlements Program in 1979. Accordingly, the Department's Office of Hearings and Appeals determined that Beacon was entitled to recover $816,122 (the amount of the overpayment) from the Entitlements Program.[1] *Beacon Oil Company*, 8 DOE Energy Mgmt. (CCH) ¶ 82,604 (1981). Similarly, in 1982, the Federal Energy Regulatory Commission, an independent appellate tribunal within the Department of Energy, found that because of severe financial hardship resulting from overpayments that the Department of Energy had erroneously required Beacon to make to the Entitlements Program in 1980, Beacon was entitled to recover $2,617,521 from the Entitlements Program. *Beacon Oil Company*, 21 FERC Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,130 (1982).

Like Petitioners, Beacon was required to struggle for several years to secure compliance by DOE with these final administrative orders. Finally, as a result of rulings by several district courts, including a ruling secured by Petitioners in 1985, the Department of Energy complied with its final administrative orders and returned to Petitioners, Beacon, and other similarly situated companies the money that the agency had erroneously

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[1] Pursuant to 42 U.S.C. § 7194, the Department of Energy was required by Congress to grant so-called exception relief to remedy hardships or inequities caused by the DOE's regulations.

required these companies to pay to other refiner-participants in the Entitlements Program. The money was paid from an interest-bearing escrow account established by the Department for the benefit of firms and individuals determined to be entitled to the funds in the account. The Department, which never claimed a beneficial interest in the funds, determined that Petitioners, Beacon, and other similarly situated firms were proper claimants of these escrowed funds. Nevertheless, the Department refused to pay Beacon or Petitioners the full amount of the interest earned by the funds in the account.

STATEMENT

Regulatory Background

From 1973 through 1981 the price of crude oil and refined petroleum products sold in the United States was subject to regulations promulgated and enforced by the Department of Energy and its predecessor agencies.[2] During that period, DOE sought to enforce its regulations by requiring firms that had charged prices in excess of those permitted by the regulations to refund the overcharges to the persons or parties injured by such overcharges.

In some instances, however, it was not a simple matter to determine exactly who suffered injury as a result of the overcharges, and the extent of that injury. This was especially true of regulatory violations committed by crude oil producers because of the operation of DOE's Entitlements Program which, in effect, spread the impact of such violations to all domestic refiners and their customers.

As a result of the inherent difficulty in ascertaining who suffered injury as a result of pricing violations, and

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[2] For simplicity the Department of Energy and its predecessor agencies shall be referred to collectively as DOE.

the extent of each such injury, DOE adopted regulations (the Subpart V Regulations), 10 C.F.R. § 205.280 et seq. (1986) for distributing funds which the agency collected in enforcement proceedings. These regulations established—

> special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified by a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive.

10 C.F.R. § 205.280 (1986). The Subpart V regulations explicitly authorize the deposit of the enforcement funds in an interest-bearing escrow account until they are distributed to rightful claimants. 10 C.F.R. § 205.287(a) (1986). The regulations also contemplate that the interest earned on the escrowed funds is to accumulate for the benefit of successful claimants:

> The aggregate amount of all refunds approved by the Office of Hearing and Appeals or its designee in a given case shall not exceed the amount to be remitted pursuant to the relevant DOE enforcement order, *plus any accumulated interest*, reduced by the amount of any administrative costs approved by the Office of Hearings and Appeals.

10 C.F.R. § 205.286(a) (1986) (emphasis added).

The Overcharge-Escrow Account

Over the years DOE took custody of funds remitted pursuant to Consent Orders or Remedial Orders in over 250 cases involving alleged crude-oil-pricing violations. Under the authority of the Subpart V Regulations these

funds were transferred to DOE's Office of Hearings and Appeals which immediately deposited them in an interest-bearing escrow account pending resolution of the Subpart V proceedings.[3] *See, e.g.*, 47 Fed. Reg. 4583 (1982); 47 Fed. Reg. 16,382 (1982); 49 Fed. Reg. 44,541 (1984). These 250 cases were ultimately consolidated into four Subpart V proceedings involving approximately $200 million in principal alone ("the overcharge-escrow account"). *See* 50 Fed. Reg. 1919, 1921 (1985).

Entitlements Exceptions Relief Proceedings

While the $200 million was earning interest, Petitioners and *amicus* Beacon secured final administrative orders ruling that, in order to remedy severe financial hardship and gross inequity, they were entitled to recover the money that DOE had erroneously required them to pay into the Entitlements Program. These orders afforded DOE the discretion to provide the mandated repayment either through operation of the Entitlements Program or through any equivalent mechanism if the agency chose to terminate the Entitlements Program.

As fully set forth by Petitioners (Pet. at 4-10), efforts were made over the course of years to secure satisfaction of the final administrative orders. DOE, however, invoked one excuse after another for its failure to pay Petitioners and Beacon the principal on the sum that the administrative orders had determined Petitioners and Beacon were entitled to recover in order to remedy serious financial hardship. Thus, notwithstanding the finding that Beacon suffered serious financial hardship in 1979 and 1980 as a direct result of DOE's error in re-

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[3] Custody of these funds were initially taken by DOE's Office of Enforcement or Office of Special Counsel—the prosecutorial offices within DOE. The funds were held in escrow by those offices until DOE's Office of Hearings and Appeals assumed jurisdiction under Subpart V.

quiring the company to pay $3.4 million into the Entitlements Program, and that Beacon was entitled to recover this money, DOE withheld this relief from Beacon.

Only in 1985, after four district courts had ordered DOE to implement the agency's own final orders granting exception relief (Pet. at 9 & n.7) did DOE announce that Petitioners, Beacon and other similarly situated companies would receive their money from the overcharge-escrow account. DOE took this belated action because its Office of Hearings and Appeals determined that refiners, as a class, were injured by price control violations committed by crude oil producers. As a result, DOE determined that Petitioners, Beacon and other similarly situated companies were rightful claimants to the overcharge-escrow funds. 50 Fed. Reg. 27,402, 27,403 (1985). Based on its determination that Petitioners and Beacon were beneficiaries of the overcharge-escrow funds, DOE finally paid Petitioners and Beacon, out of the overcharge-escrow account, the sums required to be paid by the agency's own long-standing final orders.

DOE did not, however, pay Petitioners or Beacon the full amount of interest that had accrued on the overcharge-escrow funds. In violation of its own regulations, DOE refused to include Petitioners' and Beacon's *pro rata* share of the accumulated interest as part of their recovery from the overcharge-escrow account notwithstanding the fact that (1) the overcharge-escrow funds were deposited in an interest-bearing escrow account, as authorized by Subpart V; (2) DOE found that Petitioners and Beacon were beneficiaries of the funds in that account; (3) under Subpart V the interest was to accumulate for the benefit of successful claimants; and (4) DOE has never claimed a beneficial interest in the overcharge-escrow account or on the interest that accrued on the funds in that account. 50 Fed. Reg. 41,572, 41,575 (1985). Rather, DOE agreed to pay *some* inter-

est, *i.e.*, interest accruing from October 1985—a date chosen totally at random.[4]

The Court of Appeals' Ruling

DOE did not appeal any of the district court orders requiring payment of principal (Pet. at 10). Rather, the only issue presented to the court of appeals was whether DOE was required to pay Petitioners the interest that had accumulated on the funds in the overcharge-escrow account.

The court of appeals did not treat the issue before it as the propriety of awarding the successful claimant of escrowed funds the interest that had accrued on those funds. Rather, the court of appeals viewed the issue as being simply whether interest was awardable against the United States, and simplistically applied the general rule that "sovereign immunity precludes an award of pre-judgment interest against DOE . . . ." Pet. App. at 7a. The extent of the court's rationale was that the claim for the accumulated interest on the escrowed funds was a "claim against the United States", *id.*:

> *It is significant that the* [*Supreme*] *Court has never considered the nature of the account to be in any way important.* It makes no difference whether the money has been set up as a "separate trust fund" or a "separate account" or, as in this case "as a separate interest-bearing account in the United States Treasury . . . ." The Treasury has the money and the claim is against the United States to recover that money. This is sufficient to bring sovereign immunity into play.

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[4] This action is totally inconsistent with DOE's conduct in similar cases. *See, e.g.*, Texas Oil and Gas Corporation/Mobil Oil Corporation, 14 DOE Energy Mgmt. (CCH) ¶ 85,029 at 88,056 (1986), which granted Mobil Oil Corporation a share of an overcharge-escrow fund, established under Subpart V, plus "interest of $1,166,730 accrued since the consent order funds were deposited into the escrow account." Beacon is aware of no other case in which accumulated interest was not made a part of a Subpart V award.

Pet. App. at 9a (emphasis added). The court of appeals thus ignored the purposes and policy justifications for the sovereign immunity doctrine. Rather, the court looked solely to the fact that "[t]he Treasury has the money" and failed to consider (1) that the United States had never claimed a beneficial interest in the escrowed funds; and (2) that the funds were being held in an interest-bearing escrow account for the benefit of Petitioners and Beacon. Thus, the court extended the sovereign immunity doctrine to interest earned on monies held in escrow for private parties, despite the fact that the government has never claimed a beneficial interest in the escrowed funds.

REASONS FOR GRANTING THE WRIT

The decision by the court of appeals that sovereign immunity bars a claim for the accumulated interest on private funds held in escrow, by the United States, for their rightful owner is an unwarranted and unprecedented expansion of the sovereign immunity doctrine. A claim for interest *earned* on escrowed private funds is not a claim for interest to be paid by the United States Treasury. Indeed, it is well-established that interest earned on escrowed funds "follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). The overcharge-escrow funds are undeniably private funds—the government has never claimed a beneficial interest in the principal. The mere fact that such funds were in the temporary possession of the United States cannot convert such private funds into public funds. By ruling that recovery of the accrued interest is barred by sovereign immunity, however, the court of appeals has either ruled that (1) the interest is public money although the principal is private money; or (2) the sovereign immunity doctrine bars the recovery of private funds simply be-

cause such funds were temporarily in the possession of the United States. In either case, the court of appeals' expansion of the sovereign immunity doctrine flies in the face of both logic and precedent. In *Henkels v. Sutherland*, 271 U.S. 298 (1926), this Court unequivocally held that a claim for interest earned on private property held by the federal government is not barred by sovereign immunity. *See also Webb's Fabulous Pharmacies, supra.* These cases were simply ignored by the court of appeals.

The impact of the ruling below extends far beyond both the litigants in this case and the DOE regulatory program. The status of interest earned on funds held by the United States has become increasingly important in recent years as the role of the federal government as collector of and repository for escrowed funds has greatly increased. The DOE is not the only federal agency administering hundreds of millions of dollars in interest-bearing escrow accounts. The Securities and Exchange Commsision, the Federal Trade Commission and the Consumer Product Safety Commission routinely recover millions of dollars from violators of various federal statutes, hold such money in escrow, and seek to return it to the parties injured by the statutory violations. Moreover, under 28 U.S.C. §§ 2041, 2042 (1982), federal courts administer millions of dollars in escrow accounts. Since 1983, Fed. R. Civ. P. 67 requires such accounts to be interest-bearing.

Finally, if the sovereign immunity doctrine is expanded to bar recovery of interest earned on private funds held in escrow by federal agencies, on the theory that such interest belongs to the government, such agencies will be encouraged to delay disbursing funds to their rightful owners because the funds will be earning interest for the government as long as they remain in the possession of the government.

A. The Soverign Immunity Doctrine

It is well-established that the purpose of the sovereign immunity doctrine is to prevent litigation from interfering with public acts that are essential to govern the nation. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States v. Lee*, 106 U.S. (16 Otto) 196 (1882); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868). Thus, the rule has evolved that in the absence of a waiver, the doctrine bars recovery of a judgment which would "expend itself on the public treasury or domain, or interfere with the public administration." *Land v. Dollar*, 330 U.S. 731, 738 (1947). In recent years, however, the doctrine has been viewed with some disfavor, being criticized as "irrational and immoral" with "little doctrinal coherence." *Interfirst Bank Dallas, N.A. v. United States*, 769 F.2d 299, 302 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1986). While the doctrine has, nevertheless, "been repeatedly upheld by the Supreme Court, and though limited by Congress, has never been waived generally", *id.*, there is no basis whatsoever for expanding the doctrine to bar recovery of interest, earned on private funds, where the government has never claimed a beneficial interest in those funds.

B. The Sovereign Immunity Doctrine Does Not Bar Recovery Of Accrued Interest On Private Funds Held In An Interest-Bearing Escrow Account Where The Government Has Not Claimed A Beneficial Interest In The Principal

The court of appeals began and ended its analysis of this case with the observation that the "Treasury has the money and the claim is against the United States to recover that money." Pet. App. 9a. This, however, does not end the inquiry. The claim for interest in this case was not one for interest to be paid by the United States. Rather, it was a claim for interest *earned* on escrowed funds that DOE determined belonged to Petitioners and

Amicus Beacon. In refusing to recognize this distinction, the court of appeals ignored both common sense and unambiguous precedent of this Court.

More than sixty years ago, in *Henkels v. Sutherland*, 271 U.S. 298 (1926), this Court ruled that sovereign immunity did *not* bar recovery of interest earned on the proceeds of the sale of property erroneously seized by the government. The Court's rationale was premised solely on "the nature of the account," a factor deemed irrelevant by the court of appeals in this case:

> [T]he claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession to be held, as the proceeds themselves are to be held, for the account of the Alien Property Custodian.

271 U.S. at 301. Thus, this Court simply applied the common sense principle that a claim for income derived from the investment of private property cannot possibly interfere with a governmental function and is not a claim against the United States for public funds or for funds as to which the United States claims a beneficial interest.

Indeed, the government could not claim the interest accruing on private property as its own without running afoul of another unequivocal ruling by this Court. More than fifty years after the *Henkels* decision, this Court ruled that interest on private money may not be converted into public money by *ipse dixit* in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). In *Webb's*, a sum of money, representing the amount at issue in litigation, was tendered to the Clerk of the Circuit Court of Seminole County, Florida. Pursuant to state statute, the fund was placed in an interest-bearing account.

Upon termination of the litigation, the prevailing party attempted to recover the interest that had accrued on the escrowed funds. This Court unanimously ruled that the prevailing party was entitled to the interest. The opinion first noted that "[t]he principal sum deposited in the registry of the Court plainly was private property, and was not the property of Seminole County." 449 U.S. at 160. The Court then stated that the escrow fund

> was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the Court and not for the benefit of the County.

449 U.S. at 161. The Court went on to hold that the principal did not lose its character as private property merely because it was in the temporary possession of the state, and that the interest earned on the principal was also private property:

> Neither the Florida Legislature by statute, nor the Florida Courts by judicial decree, may accomplish the result the County seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the Court. *The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.* The state statute has the practical effect of appropriating for the County the value of the use of the fund for the period in which it is held in the registry.
>
> To put it another way: A State by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in Court. This is the very kind of thing the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164 (emphasis added).

To the extent the government claims the accrued interest on the overcharge-escrow funds as its own, the

net effect of the court of appeals' decision in this case will be the very result condemned by this Court in *Webb's*—the transformation of private money into public money by *ipse dixit* and the arbitrary use of governmental power to deprive petitioner of its property. The retention of the accrued interest on the overcharge-escrow funds by DOE would be as much a taking of private property as the attempted retention of interest by the Seminole County Circuit Court in the *Webb's* case.

In the instant case, the court of appeals did not address either *Henkels* or *Webb's*. Rather, the court of appeals relied upon two cases that are inapposite. Neither case involved escrowed funds to which the United States did not claim a beneficial interest that were actually deposited in an interest-bearing account for the benefit of their rightful owners. Rather, both cases relied upon by the court of appeals involved claims for interest that would expend themselves on the public treasury.

United States v. Louisiana, 446 U.S. 253 (1980), involved a thirty-year dispute between the federal government and the State of Louisiana over ownership of offshore mineral rights. During the pendency of the litigation, revenues from the disputed mineral interests were impounded, and the impounded funds were held in a separate account in the Treasury. When the State was finally awarded the bulk of the fund, it claimed that it was entitled to interest on the money because the United States had an implied duty to invest the impounded funds in order to earn interest. This Court held that Louisiana had acquiesced for more than twenty years in the failure of the United States to invest the impounded funds and that the United States had no duty, in any event, to invest the funds. Thus, *United States v. Louisiana*, involved the issue of whether there was a duty to invest escrowed funds in an interest-bearing account—not whether the owner of the funds has a right to accrued interest once the funds have been invested.

In *United States v. N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947), customs duties had been erroneously collected by the government. The funds were subsequently "deposited in the Treasury in a trust fund entitled 'Outstanding Liabilities 1938', pursuant to 31 U.S.C.A. § 725t" pending a determination of their rightful owner. *N.Y. Rayon Importing Co. v. United States*, 64 F. Supp. 684, 685 (Ct. Cl. 1946). When finally located, the owner of the funds sought to recover interest. This Court ruled that the claim for interest was barred by sovereign immunity. Significantly, however, neither this Court's opinion nor that of the Court of Claims stated that the funds had been held in an interest-bearing account, and the issue was not addressed. Rather, the issue considered by this Court was whether sovereign immunity barred recovery of interest against the United States—*i.e.*, a judgment that would expend itself on the public treasury. Accordingly, the Court did not even address *Henkels* much less overrule it.

Finally, it is significant that the governmental function at issue in the instant case is DOE's duty to distribute funds to rightful claimants. While the purpose of the sovereign immunity doctrine is to prevent interference with governmental functions, ironically, the expansion of the doctrine to bar recovery of accrued interest on escrowed funds may actually interfere with the effective functioning of government. In this case the Department of Energy delayed in complying with its own final orders for an unconscionably long period of time. The court below stated that "[t]he actions by DOE over the last five years in this and other matters have simply been beyond belief." Pet. App. at 7a. To the extent the decision below stands for the proposition that accrued interest on escrowed funds belongs to the government, it will be a signal to administrative agencies holding funds for private citizens that the longer they delay in reaching a resolution regarding disposition of the funds, the greater the benefit to the government because the govern-

ment will retain the interest that accrues on such funds. Thus, the effective functioning of government, one of the primary purposes served by the sovereign immunity doctrine, will be thwarted, not furthered, by expanding it to bar recovery of accrued interest on escrowed funds.

C. This Is An Important Area Of The Law That Should Be Addressed By This Court

The court of appeals' decision has a potentially far-reaching impact. While the *Henkels* case was decided more than sixty years ago, the status of interest earned on funds held by the United States has become an increasingly important issue because of the widespread use of escrow accounts by the federal courts and administrative agencies.

In the sixty years since the *Henkels* decision, the role played by the federal government in the economy in particular, and in society in general, has increased dramatically. Administrative agencies that did not exist in 1926, such as DOE and the Securities and Exchange Commission, routinely collect and hold large sums of money for the benefit of private parties.

One recent, and well publicized, example is the action taken by the Securities and Exchange Commission against Ivan Boesky. As a result of this action, Mr. Boesky was required to remit $100 million to the United States for alleged violations of the securities laws. Of this $100 million, $50 million was set aside to be held, in an interest-bearing account, for the benefit of persons injured by his alleged violations. *SEC v. Boesky*, No. 86 Civ. 8767 (S.D.N.Y. Nov. 14, 1986).[5] Another example

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[5] A copy of this unreported judgment has been lodged with the Court.

is the overcharge-escrow account involved in this very case, which still contains hundreds of millions of dollars earning interest and awaiting distribution.

Similarly, the role of federal courts as custodians of escrowed funds has become increasingly important under 28 U.S.C. §§ 2041, 2042, which establish the procedures for creating and administering escrow accounts in United States district courts. Since 1983, Fed. R. Civ. P. 67 has required funds deposited in court-administered escrow accounts to be placed in an interest-bearing account. Thus, it has become routine for federal courts and federal agencies to hold hundreds of millions of dollars in interest-bearing accounts for the benefit of private parties. The sovereign immunity doctrine should not be expanded to bar recovery of interest that accrues on such escrowed funds.

In sum, the decision below constitutes an unwarranted and unprecedented expansion of the sovereign immunity doctrine. The funds at issue are not government funds and the government has never claimed a beneficial interest in the principal. Moreover, because the principal had been deposited in an interest-bearing account for the benefit of rightful claimants, the accumulated interest has never been government property. To the extent DOE is now claiming the accumulated interest, however, DOE is engaging in a Fifth Amendment taking of the type condemned by this Court's ruling in *Webb's Fabulous Pharmacies*.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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